

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D18377
Y/kmg

_____AD3d_____

Submitted - February 13, 2008

PETER B. SKELOS, J.P.
FRED T. SANTUCCI
JOSEPH COVELLO
WILLIAM E. McCARTHY
CHERYL E. CHAMBERS, JJ.

2007-02015

DECISION & ORDER

Otha Charles Hargrove, appellant,
v New York City Transit Authority,
et al., respondents.

(Index No. 28236/04)

Napoli Bern Ripka, LLP, New York, N.Y. (Denise A. Rubin of counsel), for appellant.

Wallace D. Gossett, New York, N.Y. (Steve S. Efron of counsel), for respondents New York City Transit Authority and Richard K. Yanity.

Abamont & Associates (Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale, N.Y. [Gregory A. Cascino] of counsel), for respondents Callie M. Sams and Lance Sams.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (Lane, J.), entered January 25, 2007, which granted the motion of the defendants New York City Transit Authority and Richard K. Yanity and the separate motion of the defendants Callie M. Sams and Lance Sams for summary judgment dismissing the complaint insofar as asserted against them on the ground that he did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

ORDERED that the order is affirmed, with one bill of costs payable to the defendants.

March 18, 2008

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The Supreme Court properly determined that the defendants satisfied their respective prima facie burdens on their separate motions for summary judgment by showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345; *Gaddy v Eyler*, 79 NY2d 955, 956-957).

In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff relied on various unaffirmed and unsworn medical reports in opposing the defendants' motions, all of which were without any probative value (see *Patterson v NY Alarm Response Corp.*, 45 AD3d 656; *Verette v Zia*, 44 AD3d 747, 748; *Nociforo v Penna*, 42 AD3d 514, 515; see also *Grasso v Angerami*, 79 NY2d 813; *Pagano v Kingsbury*, 182 AD2d 268). The affirmation of Dr. Arden Kaisman, one of the plaintiff's physicians, also was insufficient to raise a triable issue of fact since Dr. Kaisman relied on an unsworn report of another physician in reaching his conclusions (see *Malave v Basikov*, 45 AD3d 539, 540; *Govori v Agate Corp.*, 44 AD3d 821; *Verette v Zia*, 44 AD3d at 748; *Furrs v Griffith*, 43 AD3d 389, 390; *Friedman v U-Haul Truck Rental*, 216 AD2d 266, 267).

The plaintiff's magnetic resonance imaging reports merely showed that as of August 2004 the plaintiff had, among other things, a bulging disc at L5-S1. The mere existence of a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (see *Shvartsman v Vildman*, 47 AD3d 700; *Patterson v NY Alarm Response Corp.*, 45 AD3d 656; *Tobias v Chupenko*, 41 AD3d 583, 584; *Mejia v DeRose*, 35 AD3d 407, 407-408). Further, the plaintiff's self-serving affidavit was insufficient to raise a triable issue of fact, as there was no objective medical evidence in support of it (see *Shvartsman v Vildman* 47 AD3d 700; *Tobias v Chupenko*, 41 AD3d at 584).

The plaintiff's remaining admissible medical submissions were insufficient to establish that he sustained a medically-determined injury of a nonpermanent nature which prevented him from performing his usual and customary activities for 90 of the 180 days following the subject accident (see *Roman v Fast Lane Car Serv., Inc.*, 46 AD3d 535; *Sainte-Aime v Ho*, 274 AD2d 569, 570).

SKELOS, J.P., SANTUCCI, COVELLO, McCARTHY and CHAMBERS, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court

